No. 86-554

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SUSAN STEWART, *et al.*,

Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

I. WHEN A UNION SUES A DISSENTING NON-MEMBER TO COLLECT AN UNPAID REPRESENTATION FEE, IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:

   A. A Pro Rata Share Of The Proven Costs Of Collective Bargaining; Or

   B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

II. DOES THE FIRST AMENDMENT PERMIT A COURT TO ENTER JUDGMENT FOR AFFILIATION FEES IN A SUIT TO COLLECT THE REPRESENTATION FEE WHEN THE UNION HAS PRESENTED NO EVIDENCE OF ACTUAL EXPENDITURES FOR SERVICES PROVIDED TO THE DISSENTERS' BARGAINING UNIT BY THE STATE AND NATIONAL AFFILIATES?

LIST OF PARTIES

In addition to the parties named in the caption the following individuals are petitioners: Kathryn Washburn, Floyd Trosper, Deborah Vice Varga, David Washburn, Yvonne Tofthagen, Harry Tolmen, Patricia Tolmen, Donald Thomas, Sandra Thomas, Daniel Shead, William Spier, David Feikes, Lawrence Strick, Kathy Nova, Michael Powers, Gail Schroeder, David Millar, Timothy Moffitt, William Lynch, Randall McCammack, David Mathews, Donald Kauffman, Janis Kiff, Patricia Lynch, Rebecca Higgens, Michael Jennings, Dimitri Gloss, Donald Kane, Gerando Gonzalez, William Haselton, Christine Cortier, Phyllis Curtiss, Marsha Belsaas, Ronald Colborne, Brenda Moffitt, and Carol Colborne.

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Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

REFERENCE TO RULINGS

The decision of the Indiana Court of Appeals is reported at 487 N.E.2d 1324. It is reproduced in the Appendix at page 1a. The order of the Indiana Court of Appeals denying rehearing is unpublished and is included in the Appendix at page 17a. The order of the Supreme Court of Indiana denying the petition to transfer the cause to that court is unpublished. It is included in the Appendix at page 18a. The decision of the County Court is unpublished and it is included in the Appendix at page 13a.

JURISDICTION

The judgment of the Indiana Court of Appeals is dated January 22, 1986. Appendix, page 1a. Petitioners' petition for rehearing was denied by that court on March 26, 1986. Appendix, page 17a. Their timely petition to transfer the cause to the Supreme Court of Indiana was denied by that court July 7, 1986. Appendix, page 18a. This petition will be filed within 90 days of that date.

This Court has jurisdiction by virtue of 28 U.S.C. § 1257(3). Because the Supreme Court of Indiana denied the petitioners' motion to transfer the cause to that court, the Court of Appeals is the highest court of Indiana in which a decision could be had. *See*, *Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(3) "where any title, right, privilege or immunity is specially set up or claimed under the Constitution." As shown below, petitioners' defenses throughout the Indiana proceedings were based on their rights, privileges and immunities under the Constitution of the United States. Therefore, this Court has jurisdiction to review the judgment below by writ of certiorari. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 378 U.S. 540 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Respondent, New Prairie Classroom Teachers Association (NPCTA), is the exclusive bargaining agent for the teachers, including the petitioners, employed by the Board of School Trustees of the New Prairie United School Corporation (Corporation). Labor-management relations between NPCTA and the Corporation are governed by the terms of Indiana's Certified Educational Employees Bargaining Act (CEEBA), I.C. 20-7.5-1-1 *et seq*. NPCTA and the Corporation negotiated a collective bargaining agreement which went into effect on July 1, 1980.

Article IV, Sub-paragraph 4.6 of the Agreement provides that all members of the bargaining unit who are not also members of the Association have an obligation to pay a representation fee to the Association for services rendered to all teachers. The Agreement also provides that no member of the bargaining unit will be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative.

The petitioners are not members of the NPCTA and they refused to pay any fee to it. Thereafter, on February 23, 1981, thirty-seven (37) separate Notices of Claim were filed by the NPCTA in the La Porte County Court,

La Porte Division, Small Claims Court. Following litigation which established the validity, under Indiana law, of the agency shop provision, *see*, *New Prairie Classroom Teachers Association v. Stewart*, 460 N.E.2d 149 (Ind. App. 1983), *trans. denied*, (Stewart I), a further trial was held on May 7, 1984, at which additional evidence was received. During this trial, in their post-trial briefs and in their motion to correct errors to the County Court the petitioners claimed that any judgment for an agency-shop fee in excess of $8.82 per individual was unconstitutional because it would be in excess of a pro rata share of the NPCTA's proven costs of representation. In this petition the teachers are attacking only the method by which the fee for NPCTA was calculated. They are abandoning their claim that certain of NPCTA's expenditures are not chargeable to them (but not their claim that certain expenditures of NPCTA's state and national affiliates are non-chargeable).

The record evidence with respect to the activities of NPCTA showed that its total expenditures for the year, other than dues payments to affiliate organizations, were $1,425.72 and that during the year there were 123 employees in the unit. Joint Deposition of Linda Miller and Jack Kenyon, p. 30 and Ex. 1 (R. 269-270). Thus, under any circumstances, the maximum fee for NPCTA can not exceed $11.59 ($1,425.72 divided by 123). The trial court awarded NPCTA a fee equal to its local membership dues of $20.00. Appendix, page 15a.

NPCTA is affiliated with the Indiana State Teachers Association (ISTA), a statewide organization, and the National Education Association (NEA), a nationwide organization. The judgment of the trial court includes a fee of $128.45 for ISTA and a fee of $41.71 for NEA.

Appendix, page 15a.

During 1980-81 there were 49,641 potential ISTA members, of whom 37,311 were members and 12,330 were nonmembers. Plaintiffs Exhibits No. 6-II (R. 727) and 7-II (R. 733). These exhibits also show that ISTA's claimed chargeable expenses for the year were $4,247,066. A pro rata share of the claimed expenses is $85.56 ($4,247,066 divided by 49,641). The trial court awarded a fee for ISTA of $128.45 based upon the Union's dues-less-rebate calculation. The petitioners argued that the proof was inadequate to justify any fee for ISTA because no attempt was made to show the cost of services rendered to or on behalf of NPCTA and that, even if there were, the maximum fee was a pro rata share of $85.56. The trial court awarded a fee of $128.45 for ISTA. Appendix, page 15a.

The fee claimed for NEA was $41.71. Membership figures in Indiana for NEA are the same as for ISTA. The teachers made the same arguments with respect to NEA as they did with respect to ISTA. In their view no fee was due to NEA because of a failure of proof and, even if there were, the maximum fee was a pro rata share of $31.35. The trial court awarded a dues-less-rebate fee of $41.71 for NEA.

As stated in the motion to correct errors filed in the County Court:

> The Court erred in finding that a representation fee may be based on dues *less* political, ideological, organizing and certain legal expenses. The proper measure of a representation fee is a pro rata share of the exclusive representative's costs of collective bargaining, contract administration and grievance

adjustment and the performance of other statutory duties *vis-a-vis* the employer, not other government entities. If other organizations assist NPCTA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than NPCTA are not a recoverable expense.

* * * *

In a suit-for-representation-fee case the measure of damages is not the amount of dues paid by a member; rather it is a pro rata share of the expenses incurred by the exclusive representative in performing its statutory duties. By finding that NPCTA is entitled to $20.00 as its portion of the representation fee the Court ignored uncontradicted evidence that the maximum permissible pro rata fee based upon NPCTA's expenditures for the year is $11.59 per defendant.

* * * *

By finding that ISTA and NEA are entitled to a fee equal to membership dues less the amount of their self-determined rebate the Court failed to require the plaintiff to prove the amount those organizations spent in assisting NPCTA in performing its statutory duties as the exclusive representative in the New Prairie schools. It is unlawful to charge the defendants with expenses incurred in lobbying any governmental agency other than the

> employer—here the Board of Trustees of the New Prairie School Corporation. The evidence in the record clearly shows that most of the activities of ISTA and NEA involve interaction with state and federal agencies other than the employer of the defendants. The costs of such activities are not chargeable to the defendants.
>
> * * * *
>
> The Court's Conclusions of Law are erroneous in that any agreement which purports to authorize a representation fee in excess of a *pro rata* share of the plaintiff's costs necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees in dealing with the New Prairie School Corporation on labor-management issues is unconstitutional.

In their arguments to the County Court the petitioners cited and relied on this Court's agency fee cases, including: *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Machinists v. Street*, 367 U.S. 740 (1960); and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). In terms of dollars the petitioners argue here that the maximum permissible fee is $11.59. The trial court entered a judgment against each individual in the amount of $190.16. The petitioners appealed.

In the Court of Appeals the petitioners made the same arguments and relied on the same cases as they had in the trial court. The constitutional argument presented was phrased as follows:

> The judgment is unconstitutional because the

> amount exceeds a pro rata share of plaintiff's costs necessarily or reasonably incurred for the purpose of performing the duties of the exclusive representative of the defendants in dealing with the New Prairie United School Corporation on labor-management issues.

The Court of Appeals rejected this argument, holding that:

> The trial court did not err in basing the representation fee on regular dues less an amount spent on political or ideological activities unrelated to NPCTA's duties as an exclusive representative.

Appendix, page 8a. The Court of Appeals affirmed the judgment of the trial court on January 22, 1986.

The teachers' required petition for rehearing was filed in the Court of Appeals on February 7, 1986. This Court decided *Chicago Teachers Union v. Hudson*, 475 U.S. ——, 106 S. Ct. 1066 (1986) on March 4, 1986. *Hudson* was filed with the Court of Appeals as a supplemental authority along with a petition arguing that the decision of the Court of Appeals was contrary to *Hudson*. NPCTA's motion to strike this filing was granted on March 26, 1986, and the petition for rehearing was denied on the same date. Appendix, page 17a.

On April 14, 1986, petitioners filed a petition to transfer the cause to the Supreme Court of Indiana for review. In their supporting brief they made the same constitutional arguments that had been made in the Court of Appeals. In their brief they argued that *Hudson* and the other agency fee decisions of this Court required review and reversal of the decision. The petition for

transfer was denied on July 7, 1986. Appendix, page 18a. Thus, the Court of Appeals is the highest court of Indiana in which a decision could be had in this case and 28 U.S.C. § 1257(3) gives this Court jurisdiction to review that decision.

REASONS FOR ALLOWING THE WRIT

I. THE DECISION OF THE INDIANA COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT WHICH ARE *ABOOD*, *ELLIS* AND *HUDSON*.

A. The Method Of Calculation.

Abood, *Ellis* and *Hudson* mandate that an agency shop fee be based on the exclusive representative's costs of providing required services to the bargaining unit.

> The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

Abood, 431 U.S. at 225-26. In *Abood* the Court went on to approve the concept of agency shops for public employees. In doing so the Court pointed out that there will "be difficult problems in drawing lines between collective bargaining activities for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is pro-

hibited." *Id.* at 236. The Court also pointed out that the remedy must prevent "compulsory subsidization of ideological activity" while at the same time permitting the union "to require every employee to contribute to the cost of collective bargaining activities." *Id.* at 237. It is *costs*, not dues, for which contributions can be compelled.

Ellis involved an agency shop for private sector employees but the test of chargeability formulated therein is a constitutional one. 466 U.S. at 455. *Ellis* is a line-drawing case decided under the Railway Labor Act. There, the Court explained that the justification for union or agency shops is to eliminate the "free rider"—the employee whom the union is required to represent but who has refused to contribute to the cost of such representation. With respect to such contributions the Court said:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448. Again, it is *costs*, not dues, for which contributions can be compelled.

Hudson concerned the procedural protections which must be in place before compelled contributions may be involuntarily deducted from a dissenting nonmember's salary. Nevertheless, it is precedent with regard to the questions presented here, because it requires that information with respect to expenditures be furnished to nonmembers, and disapproves of a fee calculated on a percentage of dues basis. *Hudson* makes clear that a fee may be compelled to collect for collective bargaining costs, not other expenses.

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.[18]

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[18] We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Allen*, 373 U.S., at 122, 83 S.Ct. at 1163-1164, quoted in *Abood*, 431 U.S. at 239-240, n.40, 97 S.Ct. at 1801-1802 n.40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verifica-

> tion by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n.4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Hudson, 106 S. Ct. at 1076.

The Indiana Court of Appeals was aware of *Hanson*, *Street*, *Allen*, *Abood* and *Ellis* when it made its decision, yet it determined that the dues paid by a member was the proper measure of damages in this case. That this results in a glaring violation of teachers' First Amendment rights is best shown by the facts that a pro rata share of all NPCTA expenses was $11.59 and the recovery permitted by the court below was $20.00, the amount of local dues. The First Amendment violation is clear, as is the failure of the Indiana Court of Appeals to properly interpret and apply *Abood*, *Ellis* and *Hudson*.

The Indiana Court of Appeals reasoned thusly:

> The teachers argue that the method for calculating their representation fee should be a pro rata share of the amount actually spent on collective bargaining activities, with NPCTA required to prove such amount. The United States Supreme Court has not gone so far. The formula which the trial court used was suggested by the Supreme Court itself. *International Ass'n of Machinists v. Street* (1961), 367 U.S. 740, 774-75. Last year in *Ellis* the Court reviewed a rebate plan in which a proportional amount was refunded to objecting employees at the end of the year, after political and ideological expenditures had been calculated. While

> the Court found the rebate plan itself inadequate in that it constituted an involuntary loan of the full amount until the amount of the refund was determined, it did not disapprove of the method of calculation. *Ellis*, *supra*, 104 S. Ct. at 1889-90. It is true that the bargaining representative has the burden of proving the proportion of its funds which are expended for political or ideological purposes, but absolute precision is not expected or required. *Brotherhood of Railway & S.S. Clerks, etc. v. Allen* (1963), 373 U.S. 113, 122. Nothing in the Supreme Court's decisions suggests that a union should be required to prove its exact expenditures for collective bargaining purposes.

Appendix, page 7a. Such reasoning flies in the face of this Court's statement in *Ellis* that the Court's comments about remedy in *Street* and *Allen*, "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, 466 U.S. at 443. The Court of Appeals' reasoning also is contrary to the holding in *Ellis*, 466 U.S. at 457 n.15 (emphasis added), "that the union bears the burden of what proportion of *expenditures* went to activities *that could be charged* to dissenters" by "the preponderance standard normally applicable in civil suits for damages."

Moreover, the result reached is inconsistent with *Hudson*, because the Indiana court accepted the union's dues-less-rebate approach. *Hudson* specifically rejected proof of that nature as satisfying the notice required for First Amendment procedural due process:

> An acknowledgment that nonmembers would not be

> required to pay any part of 5% of the Union's total annual expenditure was not an adequate disclosure of the reasons why they were required to pay their share of 95%.

Hudson, 106 S. Ct. at 1076. The First Amendment requires that the union identify "the expenditures for collective bargaining and contract administration * * * for which nonmembers as well as members can fairly be charged a fee." *Id.* Surely a union that sues to collect a representation fee must show *no less* at trial before a court can enter a judgment depriving employees of their property. *See*, *Hudson*, 106 S. Ct. at 1074 n.13; *Kusper v. Pontikes*, 414 U S. 51, 58-59 (1973); *Speiser v. Randall*, 357 U.S. 513, 524-25 (1958).

B. The Evidence Is Inadequate To Show That ISTA And NEA Are Entitled To Any Fee.

If other organizations assist NPCTA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than NPCTA are not expenses recoverable from these teachers.

The information provided at trial on behalf of ISTA and NEA is precisely of the same type determined by the Supreme Court to be inadequate in *Hudson*. If such information is inadequate to meet the procedural requirements of the First Amendment, it is also inadequate to meet the due process requirements of the Fourteenth

Amendment. *See*, *Hudson*, 106 S. Ct. at 1074 and nn. 11 & 13. In this connection it must be remembered that it is the employees' First Amendment rights that are involved. Any state-authorized encroachment upon those rights must be narrowly drawn so as to be the least restrictive alternative accomplishing the governmental purpose involved. The purpose here is the elimination of the "free rider." That purpose is met by requiring payment for the Union's performance of its statutory duties "in dealing with the employer on labor-management issues." *Ellis*, 466 U.S. at 448.

By finding that ISTA and NEA are entitled to a fee equal to membership dues less the amount of their self-determined rebates, the Court of Appeals failed to require the plaintiff to prove the amount those organizations spent in assisting NPCTA in performing its statutory duties as the exclusive representative in the New Prairie schools. The teachers contend that the vast majority of NEA's and ISTA's activities, political or otherwise, are not "related to collective bargaining" with the Corporation as this Court understood that concept in *Abood*. The plurality opinion in *Abood* held that, although collective bargaining in public-sector employment is itself a "political" activity, a state statute could require dissenting employees (such as the teachers here) to associate with an exclusive representative (such as NPCTA) for the purpose of bargaining.

And it went on to hold that certain other "political" activities "might be seen as an integral part of the bargaining process." 431 U.S. at 227-32, 236 (opinion of Stewart, J.).

The definition of "collective bargaining" used in

Abood, though, was quite precise. The Michigan statute at issue itself defined "collective bargaining" as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement if requested by either party.

Mich. Comp. Laws § 423.215. And the *Abood* plurality reflected just such an understanding of collective bargaining—but no more. For example, the plurality referred to "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances"; by way of examples, it spoke of "the union's policy in negotiating a medical benefits plan," "a union policy of negotiating limits on the right to strike," "the union's wage policy," and "the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination"; it wrote of "expenditures" and "service charges * * * applied to collective bargaining, contract administration, and grievance-adjustment purposes"; and it distinguished from "collective-bargaining activities" those "social activities" that "fall outside the Union's duties as exclusive representative." 431 U.S. at 221, 225-26, 232, 236 n.33. Recognizing that successful "negotiating [of] a final agreement" might require "the approval of a higher executive authority or a legislative body," the plurality added that "subsequent approval [of a written collective-bargaining agreement] by other public authori-

ties" and "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 228, 236. Overall, then, the *Abood* plurality held that "collective bargaining" means: (i) negotiating an agreement with the public employer; (ii) where necessary, seeking the "approval of a higher executive or legislative body" to ratify or implement the agreement; (iii) administering the agreement—in short, performing the statutory duties of the exclusive representative.

Moreover, *Abood* makes clear that, with respect to a particular organization acting as an exclusive representative of particular public employees, "collective bargaining" refers only to those activities that the representative performs, pursuant to the applicable statute, *within the bargaining unit to which the employees belong*. The policy reasons that arguably justify compelling dissenting public employees to associate with a private organization as their exclusive representative rationally apply only to the unit in which those employees function—for only there does the representative have "great responsibilities" *relative to those employees*; only there may the representative's task "entail expenditures of much time and money," or even *any* time and money, ostensibly *on behalf of those employees*; only there will *those employees* possibly have "the incentive * * * to become 'free riders'"; only there is the representative "under a duty of fair representation" *to those employees*; only there will "confusion and conflict" *as to those employees' terms and conditions of employment* arguably be mitigated by collective negotiations; and only there will "labor peace" among those employees be served (if at all) by collective bargaining. *Id.* at 221, 222, 224. *See*, *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 104 S. Ct.

1844, 1851 n.22 (1984); *Hammons v. Adams*, 783 F.2d 597, 604-05 (5th Cir. 1986); *Sine v. Local 992, IBT*, 730 F.2d 964, 966 (4th Cir. 1984).

Or, in sum, "collective bargaining" under *Abood* means negotiation and administration of an agreement concerning terms and conditions of employment for employees in the bargaining unit under consideration, and (where applicable) "political" activity that is "an integral part of the bargaining process" because it is necessary to ratify or implement the negotiated agreement. "Collective bargaining" for employees in unit *A*, then, does *not* include *any* activity the organization designated as their exclusive representative performs for employees in some separate units *B*, *C*, or *D*—even if that organization or one of its affiliates is also the representative in those units. Rather, with respect to the employees in unit *A*, the activities of the representative in units *B*, *C*, or *D* constitute "political activities '*unrelated* to collective bargaining'" because: (i) that other activity is "political," by definition; and (ii) it is not a part "of the bargaining process" in the relevant bargaining unit. The holding of the Supreme Court in *Ellis* is entirely consistent with and reinforces these conclusions.

Thus, in *Ellis* the Court approved litigation costs for "disputes arising in the bargaining unit," "fair representation litigation arising within the unit," "any other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative," but excluded "the expenses of litigation not having such a connection with the bargaining unit." 466 U.S. at 453. Moreover, the general standard for chargeable costs adopted in *Ellis* limits them to activities directly tied to

the union's performance of its statutory duties as "exclusive representative of the employees *in dealing with the employer* on labor-management issues" and "as exclusive representative of the employees *in the bargaining unit.*" *Id.* at 448 (emphasis added).

The teachers submit that, based upon the evidence in this record, neither ISTA nor NEA is entitled to any payment. First, it is clear that neither organization is the exclusive representative. (R. 613, 691). Therefore, based upon *Ellis* the contract provision purporting to require payments equivalent to the dues less the self-determined rebate of these organizations is void and unenforceable. Second, assuming that some payment could be required, there is no showing in this record of any ISTA and NEA expenses that were incurred in assisting NPCTA to perform its duties as the exclusive representative of these employees.

For example, there was testimony that bargaining by NPCTA was supported in 1980-81 by a UniServ office in Michigan City manned by a Mr. Cornstubble and a secretary. (R. 608, 691). This office also assisted other bargaining units. (R. 665-67). No effort was made at the trial to show the expenses of this office, such as salaries, rent, telephone and other expenses. (R. 691). Nor was any evidence introduced to show the number of teachers in the bargaining units served by this office. In fact, Mrs. Tews, the ISTA Business Manager (R. 712), testified that the ISTA records do not show how much of the expenses of this office were spent in support of collective bargaining activity at New Prairie. (R. 734). Neither of the UniServ employees testified. Consequently, there is no proof that the cost of any UniServ activity is chargeable to the teachers.

The same is true of the other categories of expenses testified to by Mr. Harris, the Executive Director of ISTA (R. 662), and Mrs. Tews. Take, for example, legal expenses. (R. 669-70). There is absolutely no evidence in the record that any legal expense was incurred by either ISTA or NEA as a result of processing any grievance arising out of the collective bargaining agreement at New Prairie. There was testimony that NPCTA incurred some expenses in connection with an arbitration and the teachers have not contested those expenses. (R. 610). However, if ISTA incurred any expenses in connection with those matters, they are not shown in this record.

With respect to NEA, that organization is even more remote from local labor-management relations than is ISTA. The only possible expense it incurs that could be considered as chargeable is the UniServ rebate, here some $356,410.00. (Ex. I, II, Def. Ex. F, following R. 381). However, as with the ISTA UniServ program, there is no showing on this record that any portion of that rebate was expended in support of the exclusive representative at New Prairie.

Petitioners do not contend that amounts spent by ISTA and NEA in support of collective bargaining activities by NPCTA are not chargeable to nonmembers. Indeed, they concede that, if proved, they could be charged a pro rata share of such costs. However, because NPCTA presented no evidence of actual expenditures by its affiliates for the petitioners' bargaining unit, NPCTA failed to carry its burden of proof, and none of, *e.g.*, the $2,546,088 (R. 665, Def. Ex. F) spent by ISTA on UniServ can be charged to the petitioners. ISTA's admission that it cannot charge nonmembers for $150,455 of its expenses for 1980-81 (R. 733) does not prove that all of

its other expenses are chargeable to nonmembers. *Hudson*, 106 S. Ct. at 1076 n.18. Also, as shown above, membership dues less a rebate is not the proper way to calculate an agency fee. The proper way to calculate the amount of an agency fee is to determine the total chargeable costs and divide that figure by the number of people represented.

The teachers submit that in a case like this the exclusive representative must prove the costs entailed in providing collective bargaining services to the bargaining unit of which they are members. Costs incurred elsewhere or in servicing other bargaining units are not relevant to the inquiry. Once the chargeable costs are known, the fee is determined by dividing the costs by the number of people in the bargaining unit.

From all of the above, the teachers submit that the Court of Appeals erred in concluding that the NPCTA was entitled to a judgment in excess of $11.59 from each petitioner.

C. The Issues Raised In This Case Are Of Nationwide Importance.

As the Court well knows from its review of other cases, *e.g.*, *Abernathy v. San Jose Teachers Ass'n*, 475 U.S. _____, 106 S. Ct. 1372 (1986); *Tierney v. City of Toledo*, 475 U.S. _____, 106 S. Ct. 1628 (1986), suits for service fees are quite common. In Indiana the only way a union can enforce collection of a fee from a dissenter is by a civil action for damages. *See*, *Alexander v. Anderson Federation of Teachers*, 416 N.E.2d 1327 (Ind. App. 1981) (agreement making payment of an agency fee a condition of employment is illegal under Indiana law).

The result below has set the precedent which has been and will be followed by other courts. *See*, *Abels v. Monroe County Education Association*, 489 N.E.2d 533, *reh. denied*, 490 N.E.2d 775 (Ind. App. 1986), *trans. denied*, *petition for certiorari to be filed.* As indicated by the membership figures, *supra* at page 5, in Indiana alone, the First Amendment rights of approximately 12,330 teachers are likely to be abused unless this Court reviews the judgment below and clearly articulates the proper rule that an agency fee must be based on a pro rata share of an exclusive representative's proven costs of collective bargaining on behalf of the dissenting employees' bargaining unit.

CONCLUSION

For the foregoing reasons the Court should grant this petition and set the case down for plenary briefing and argument.

Respectfully submitted,

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October 6, 1986

APPENDICES

APPENDIX A

DECISION OF THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

January 22, 1986

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION, Appellant, v. SUSAN STEWART, et al., Appellees.	)	No. 3-1184 A 330 Date filed: January 22, 1986

APPEAL FROM LaPORTE COUNTY COURT
SMALL CLAIMS DIVISION
Honorable Paul J. Baldoni, Judge
Cause Number LPC-LP-81-S-8-317 Through S-8-353

STATON, P.J.

The New Prairie Classroom Teachers Association (NPCTA) filed thirty-seven small claims actions, consolidated for trial, to collect a representation fee from teachers who were not dues-paying members of NPCTA.[1] The trial court found that the clause in the teachers' collective bargaining agreement authorizing such a fee was unenforceable under the Certificated Educational Employee Bargaining Act (CEEBA), but on appeal to this Court the agreement was upheld. *New Prairie Classroom*

[1] One of the 37 teachers, Rex Thomas, died and was dismissed prior to this appeal.

Teachers Association v. Stewart (1983), Ind.App., 460 N.E.2d 149. The cause was remanded and judgment was entered against each teacher in the amount of $190.16. Appealing from this judgment, teachers raise several issues which we consolidate and restate as follows:

I. Whether the trial court erred in finding that the representation fee should include reimbursement to the Indiana State Teachers Association (ISTA) and the National Education Association (NEA);

II. Whether the trial court erred in calculating the representation fee.

Affirmed.

I.

Reimbursement to ISTA and NEA

NPCTA, which is affiliated with ISTA and NEA, is the recognized exclusive representative of teachers employed by the New Prairie United School Corporation (school board). NPCTA and the school board executed a collective bargaining agreement to run from July 1, 1980, through June 30, 1983, which provided in part:

> "*Paragraph 1.*
>
> The Board and Association agree that all members of the bargaining unit who are not also members of the Association have an obligation to pay a representation fee to the Association, including the Indiana State Teachers Association and the National Education Association.
>
> *Paragraph 2.*
>
> By October 1 of each year, the Association shall provide the Board with a list of bargaining unit members who

are not also Association members, and the Board shall request each person to submit an original individual enrollment form, within a reasonable time. Upon return of such signed form to the Board, the Board will deduct the representation fee in 22 equal installments from the payroll of each person who submits an authorization. Persons who refuse to sign an authorization form or who revoke an executed form have a continuing enforceable obligation to pay the representation fee directly to the Association; however, the employer shall be under no obligation whatsoever to enforce the terms of this Section. (4.6).

Paragraph 3.

The Association recognizes that no member of the bargaining unit should be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative.

Paragraph 4.

The parties agree that the provisions of this Article (IV) will not be enforced against any person who initiates proceedings challenging the legality of this Article, or who is a party thereto, pending final disposition of such proceedings, except that the representation fee may be collected by the Board, and held in escrow, provided such employee so consents.

Paragraph 5.

The Association, including the local, the Indiana State Teachers Association and the National Education Association agree to 'hold harmless' the New Prairie United School Corporation, its School Board, employees, agents and assigns, as to all claims that may arise in litigation

> resulting from the implementation of this provision or attempted implementation. Said Associations agree to pay all costs of such litigation, including court costs, attorney fees, judgments, penalties and interest. Prior to performance by the employer of any obligation it may have under this Article, the Employer may demand such written security, bonds, or assurances, it deems reasonable, that said Associations will comply with this section, and said Associations shall agree to execute same."

The teachers involved in this appeal refused to authorize payroll deduction or otherwise pay representation fees to NPCTA. The trial court ordered each teacher to pay a fee of $190.16, to be distributed as follows:

NPCTA :	$ 20.00
ISTA :	128.45
NEA :	41.71

The teachers argue that it was error to find that NPCTA had been elected exclusive representative in its affiliated status, because only NPCTA could be the teachers' exclusive representative. It has never been claimed that ISTA and NEA are co-exclusive representatives of the teachers. The teachers' real complaint is that ISTA and NEA receive a portion of their representation fee, because the organizations are not exclusive representatives, and because they allegedly provided no collective bargaining services to the teachers during the term for which payment is being sought.

We must note, first, that the collective bargaining agreement, which was upheld by this Court in the initial appeal of this cause, provides at Paragraph 1 that the

representation fee shall include payments to ISTA and NEA. A similar agreement and fee distribution plan was enforced in *Fort Wayne Educ. Ass'n, Inc. v. Goetz* (1982), Ind.App., 443 N.E.2d 364. As to the teachers' allegation that no collective bargaining services were provided, one purpose of these payments was to secure the availability of services from these organizations. As the United States Supreme Court has recognized,

> "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. *See Street*, 367 U.S., at 760, 81 S.Ct., at 1795. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required."

Abood v. Detroit Bd. of Education (1977), 431 U.S. 209, 221. Were NPCTA to hire local lawyers, negotiators or researchers, there would be little dispute that they could charge a fair share of the cost to the non-member teachers. Instead, they have chosen to pay a fixed, yearly amount for the continued availability of such services. The teachers cannot force NPCTA to abandon this approach, nor should they be allowed to benefit from the services of ISTA or NEA without paying a fair share of the cost of their continued availability.

II.

Representation Fee

This Court, on the initial appeal of this cause, upheld the collective bargaining agreement requiring payment of

a representation fee to NPCTA, finding it to be constitutional and authorized by Indiana statutes. *Stewart, supra*, 460 N.E.2d at 149. *See also Goetz, supra*, 443 N.E.2d 364. The United States Supreme Court has long recognized that all employees who benefit from the work of an elected bargaining representative may be required to pay their fair share of the costs. *Railway Employes' Department v. Hanson* (1956), 351 U.S. 225, 238. Employees may not, however, be required to pay for political or ideological activities to which they object. *Abood, supra*, 431 U.S. at 236-38. The test for determining whether expenses are chargeable to objecting employees was recently restated in *Ellis v. Broth. of Ry., Airline and S.S. Clerks* (1984), 104 S.Ct. 1883, 1892:

> "[T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."

In Paragraph 3 of its collective bargaining agreement NPCTA acknowledges that objecting teachers should not be forced to pay for political or ideological activities "unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative." The representa-

tion fee which the trial court ordered the teachers to pay is less than the amount paid by NPCTA members: ISTA's share was reduced by $4.55, and NEA's share was reduced by $3.29. These reductions reflect the proportion of each organization's budget which was allocated for non-chargeable political or ideological activities, according to internal estimates.

The teachers argue that the method for calculating their representation fee should be a pro rata share of the amount actually spent on collective bargaining activities, with NPCTA required to prove such amount. The United States Supreme Court has not gone so far. The formula which the trial court used was suggested by the Supreme Court itself. *International Ass'n of Machinists v. Street* (1961), 367 U.S. 740, 774-75. Last year in *Ellis* the Court reviewed a rebate plan in which a proportional amount was refunded to objecting employees at the end of the year, after political and ideological expenditures had been calculated. While the Court found the rebate plan itself inadequate in that it constituted an involuntary loan of the full amount until the amount of the refund was determined, it did not disapprove of the method of calculation. *Ellis*, *supra*, 104 S.Ct. at 1889-90. It is true that the bargaining representative has the burden of proving the proportion of its funds which are expended for political or ideological purposes, but absolute precision is not expected or required. *Brotherhood of Railway & S.S. Clerks, etc. v. Allen* (1963), 373 U.S. 113, 122. Nothing in the Supreme Court's decisions suggests that a union should be required to prove its exact expenditures for collective bargaining purposes.

The teachers cite a 7th Circuit case, *Hudson v. Chicago*

Teachers Union Local No. 1 (1984), 743 F.2d 1187, *cert. granted*, 105 S.Ct. 2700 (U.S. June 10, 1985) (No. 84-1503), to support their suggested method of calculation. In *Hudson*, non-member teachers brought suit under 42 U.S.C. § 1983, challenging the union's procedure for determining their representation fee. The school board in *Hudson* deducted the fee from non-member teachers' salaries without the teachers' authorization, and the union controlled the review procedures, including selection of an arbitrator. The 7th Circuit found this procedure to be inadequate, and wrote that the procedure should reasonably ensure that no part of the representation fee is used for any activities unrelated to the union's collective bargaining responsibilities. *Id.* at 1194. *Hudson* does not provide the support the teachers seek. The school board in this case could not withhold the representation fee from a teacher's salary without his authorization, nor could NPCTA enforce its right to the fee against a teacher who initiated a legal challenge to it, pending the final disposition of the challenge. The teachers' rights have been adequately safeguarded. The trial court did not err in basing the representation fee on regular dues less an amount spent on political or ideological activities unrelated to NPCTA's duties as an exclusive representative.

The teachers also argue that the evidence did not support the judgment against them. NPCTA, ISTA, and NEA must prove the proportion of their total expenditures which were chargeable to objecting employees. The teachers challenge certain expenditures made by each organization and argue that the organizations have failed to meet their burden of proof. In reviewing the sufficiency of the evidence, this Court will not reweigh the

evidence or judge the credibility of witnesses. We will consider the evidence most favorable to the prevailing party, together with all reasonable inferences to be drawn therefrom, to determine whether there is evidence of probative value to support the judgment. *Uebelhack Equipment, Inc., v. Garrett Bros.* (1980), Ind.App., 408 N.E.2d 136, 138.

A. ISTA & NEA

ISTA's portion of the representation fee which each teacher was ordered to pay was $128.45, or $4.55 less than the regular dues of $133. NEA's portion was $41.71, or $3.29 less than its regular dues of $45. The amount deducted from the regular dues corresponds to the amount of each group's total budget devoted to political or ideological activities.

The teachers object to the expenditures of ISTA and NEA for lobbying governmental agencies other than the school board. They argue that these activities were not related to collective bargaining and thus are not chargeable to them. The United States Supreme Court has recognized the somewhat more expansive role of the bargaining representative in the public employment sector, and the consequent difficulty in distinguishing between chargeable and non-chargeable expenses. In *Abood, supra*, 431 U.S. at 236, the Court stated:

> "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process."

The Court did not have the issue of lobbying expenses before it.

Lobbying expenses have been the subject of two recent federal court of appeals decisions, and were held chargeable in both cases. *See Champion v. State of California* (1984), 9th Cir., 738 F.2d 1082, *cert. denied* (1985), 105 S.Ct. 1230; *Robinson v. State of New Jersey* (1984), 3d Cir., 741 F.2d 598, *cert. denied* (1985), 105 S.Ct. 1228. The *Champion* Court recognized that many matters in public employment are covered by statute, and that "[t]hese statutes create a status quo from which the bargaining representatives start negotiations for their particular units." *Champion, supra*, 738 F.2d at 1086. Indiana statutes such as the minimum salary schedules, Ind. Code 20-6.1-5-1, provide a similar starting point. There was also evidence that nearly 60% of the funding for local education in 1980-81 came from the state and federal governments. The *Robinson* Court considered the inability to lobby to be a severe handicap to a public employee representative in performing its duties. *Robinson, supra*, 741 F.2d at 609.[2] We agree with both these Courts that lobbying efforts germane to the union's duties as an exclusive representative are chargeable to objecting employees.

There was evidence at trial that ISTA and NEA, through Unified Services (UniServ), provided other more direct assistance to NPCTA in performing its duties as the teachers' exclusive representative. They provided training and assistance in the area of collective bargain-

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[2] Appellants also cite *Beck v. Communications Workers of America*, 120 L.R.R.M. (BNA) 2957 (4th Cir. 1985), which criticized *Robinson* in a footnote. However, *Beck* did not involve public employees.

ing, as well as other areas. Under IC 20-7.5-1-5, NPCTA is required to discuss with the school board such topics as curriculum development and textbook selection, and UniServ provided its expertise in these areas. The political activity rebate policies of both organizations were before the trial court, and Dale Harris, Executive Director of ISTA, testified in detail concerning the procedures ISTA used to segregate chargeable and non-chargeable expenses. There was sufficient evidence that the payments to ISTA and NEA were "necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative." *Ellis*, *supra*, 104 S.Ct. at 1892. The trial court did not err in ordering the teachers to reimburse ISTA and NEA.

B. NPCTA

NPCTA's portion of the representation fee is $20, the same amount as its regular dues. NPCTA President Linda Miller testified that no money was spent on political or ideological activities. The teachers challenge certain of NPCTA's expenses and argue that this amount should be reduced.

First, the teachers argue that expenditures for attending ISTA meetings were not chargeable to them. We have already discussed the importance to NPCTA of its affiliation with ISTA; attendance at these meetings was a way of taking full advantage of that relationship. There was evidence that these meetings provided information and training in collective bargaining techniques and other areas pertinent to the operation of a local association. It was not error to find that expenditures for attending these meetings could be charged to objecting employees.

Finally, the teachers challenge what they allege to be organizing expenditures. In *Ellis*, *supra*, the Supreme Court specifically determined that organizing expenses were not chargeable to objecting employees. *Ellis*, 104 S.Ct. 1894-95. NPCTA President Miller testified that NPCTA had no out-of-pocket expenses for its membership drive for the 1980-81 term. NPCTA used the same forms, provided by ISTA, to sign up new members and to renew current members.[3] Volunteers gave the forms to individual teachers to sign. There was sufficient evidence to find that NPCTA was entitled to its entire $20 fee.

We affirm.

GARRARD, J., and HOFFMAN, J., Concur.

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[3] ISTA Executive Director Dale Harris testified that ISTA used a special formula to exclude from its chargeable expenses the cost of signing up new members.

APPENDIX B

FINDINGS AND CONCLUSIONS OF LAW OF THE LA PORTE COUNTY COURT, INDIANA

June 22, 1984

STATE OF INDIANA	)	IN THE
	) SS	LA PORTE COUNTY COURT
COUNTY OF LA PORTE	)	LA PORTE DIVISION
		1984 TERM
NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION Plaintiff versus SUSAN STEWART, et al. Defendants	)	LPC-LP-81-S-8-317 through LPC-LP-81-S-9-354 Date filed: June 22, 1984

FINDINGS

These Causes are before the Court following reversal and remand for further proceedings consistent with the Indiana Court of Appeals' decision in *New Prairie Classroom Teachers Association v. Susan Stewart, et al.*, 460 N.E.2nd 149 (Indiana Appellate, 1983). The Plaintiff appeared by counsel, Richard J. Darko, Janet C. Knapp, and Patrick E. Donoghue. The Defendants appeared by counsel, David T. Bryant and Arthur Roule, Jr. The Court received evidence, and having reviewed the briefs of the parties, and now being duly advised in the premises finds as follows:

1: The Indiana Court of Appeals held in *New Prairie Classroom Teachers Association v. Susan Stewart, supra*, that:

> "The agency shop agreement between NPCTA and the School Board as to payment of representation fees to NPCTA was authorized by law, constitutional, and binding upon non-member teachers."

2: The New Prairie Classroom Teachers Association (NPCTA), the exclusive representative of the certified school employees in the New Prairie United School Corporation, is affiliated with the Indiana State Teachers Association (ISTA) and the National Education Association (NEA). A teacher may not join the New Prairie Classroom Teachers Association without also joining the Indiana State Teachers Association and the National Education Association. The NPCTA was elected exclusive representative in its affiliated status.

3: The non-members of NPCTA are liable for a fair-share representation fee for the school year 1980-81, excluding that portion of the dues for political, ideological, organizing, and certain legal expenses. The scope of the fair-share representation fee is not limited solely to contract negotiation, but encompasses numerous statutory duties with their attendant responsibilities and activities. NPCTA's affiliation with NEA and with ISTA provides necessary and vital resources. Without its affiliation with these associations, NPCTA could not meet its legal obligations.

4: The members of NPCTA, for the school year 1980-81, paid dues in the amount of One Hundred Ninety-Eight Dollars ($198.00). The dues were distributed as follows:

NPCTA - Twenty Dollars ($20.00);

ISTA - One Hundred Thirty-Three Dollars ($133.00); and

NEA - Forty-Five Dollars ($45.00).

5: By a preponderance of the evidence, the plaintiff

has established it is entitled to recover of each of the above defendants the following:

(a) NPCTA is entitled to one hundred percent (100%), to-wit: Twenty Dollars ($20.00) per defendant for its portion of the representation fee. The defendants are not entitled to a rebate for nonchargeable expenses on this portion of the representation fee.

(b) ISTA is entitled to One Hundred Twenty-Eight Dollars and Forty-Five Cents ($128.45) per defendant for its portion of the representation fee. This assessment reflects a rebate to each defendant in the sum of Four Dollars and Fifty-Five Cents ($4.55) for expenditures not chargeable to non-members.

(c) NEA is entitled to a representation fee of Forty-One Dollars and Seventy-One Cents ($41.71), which reflects rebates to each defendant of Three Dollars and Twenty-Nine Cents ($3.29) for expenses not properly charged to non-members.

Thus, the plaintiff is entitled to recover of each of the above-captioned defendants a total representation fee in the sum of One Hundred Ninety Dollars and Sixteen Cents ($190.16).

6: The plaintiff has failed to establish its claim for prejudgment interest. The calculation of the judgments herein was neither a matter of mere computation nor ascertainable prior to judgment.

CONCLUSIONS OF LAW

1: The law is with the plaintiff and against the defendants.

2: The agency shop agreement between NPCTA and the New Prairie School Board contained in the collective bargaining agreement between said parties is a constitutional, enforceable obligation by which the plaintiff may collect a fair-share representation fee from non-members of its bargaining unit.

3: By a preponderance of the evidence, the plaintiff has established the amount of the fair-share fee for the school year 1980-1981 assessable against each defendant to be in the sum of One Hundred Ninety Dollars and Sixteen Cents ($190.16).

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of each of the above-captioned defendants the sum of One Hundred Ninety Dollars and Sixteen Cents ($190.16) and court costs in the sum of Ten Dollars ($10.00), for a total judgment of Two Hundred Dollars and Sixteen Cents ($200.16) per defendant. Said judgment is payable in a lump sum to the Clerk of the La Porte County Court, La Porte, Division, County Government Complex, Court House Square, La Porte, Indiana, 46350.

/s/
Paul J. Baldoni, Judge
La Porte County Court
La Porte Division
La Porte, Indiana

DATED: 6-22-84

APPENDIX C

NOTICE OF THE COURT OF APPEALS OF INDIANA DENYING PETITION FOR REHEARING

March 26, 1986

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 3-1184A330

New Prairie Classroom Teachers Assoc. v. Susan Stewart

You are hereby notified that the Court of Appeal

has on this day Appellants petition for Rehearing Denied.
Buchanan, C. J.

Please acknowledge receipt of this notice in order
that our records may show that you have been
notified of this action.

WITNESS my name and the seal of said court,
this 26 day of Mar , 1986

/s/
Clerk Supreme Court and Court of Appeals

APPENDIX D

NOTICE OF THE SUPREME COURT OF INDIANA DENYING PETITION FOR TRANSFER

July 7, 1986

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 3-1184A330

Susan Stewart et al v. New Prairie Classroom Teachers Association

You are hereby notified that the Supreme Court

has on this day Petitioners Petition for Transfer is hereby DENIED. Givan, C.J.
All Justices Concur.

Petition of Indiana Legal Foundation, Inc. to file brief as Amicus Curiae in Support of Appellants petition to Transfer is hereby GRANTED. Givan, C.J.
All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said court,
this 7 day of July , 1986

/s/
Clerk Supreme Court and Court of Appeals

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SUSAN STEWART, *et al.*,
Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

---

RESPONDENT'S BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether this Court should review the decision of the Court of Appeals of Indiana, which held that there was sufficient evidence in the record to justify the representation [*i.e.*, agency] fee that petitioners were ordered to pay to their exclusive collective bargaining representative, respondent New Prairie Classroom Teachers Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-554

SUSAN STEWART, *et al.*,
Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent New Prairie Classroom Teachers Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition.

STATEMENT OF THE CASE

Since at least 1974, respondent New Prairie Classroom Teachers Association ("NPCTA") has been recognized, pursuant to Indiana's Certificated Educational Employee Bargaining Act, Ind. Code § 20-7.5-1-1 *et seq.*, as the exclusive representative for a bargaining unit consisting of the teachers employed by the New Prairie

United School Corporation ("School Corporation"). Petitioners are thirty-six teachers who were employed by the School Corporation during the 1980-81 school year, and therefore were members of the NPCTA bargaining unit.

In its capacity as exclusive representative, NPCTA entered into a collective bargaining agreement with the School Corporation covering the period from July 1, 1980 through June 30, 1983. As permitted by Indiana law, that agreement included a representation fee provision [1] —*i.e.*, a provision that required bargaining unit employees who chose not to join NPCTA "to pay a representation fee to the Association, including the Indiana State Teachers Association and the National Education Association." Appendix to Petition ("App.") 2a. The Indiana State Teachers Association ("ISTA") and the National Education Association ("NEA") are, respectively, NPCTA's state and national parent organizations. As part of its affiliation relationship with ISTA and NEA, NPCTA has a "unified" membership structure, which means that a teacher may not become a member of NPCTA without also joining, and paying dues to, ISTA and NEA. App. 14a. The collective bargaining agreement further provided that no feepayer "should be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative." App. 3a.

This representation fee provision was not of the classic variety. Unlike the typical arrangement—pursuant to

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[1] *See New Prairie Classroom Teachers Association v. Stewart ("Stewart I")*, 460 N.E.2d 149 (Ind. App. 1983), *transfer denied* ("The agency shop agreement between NPCTA and the school board as to payment of representation fees to NPCTA was authorized by law, constitutional, and binding upon non-member teachers"); *Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E.2d 364 (Ind. App. 1982), *transfer denied.*

which the fee automatically is deducted from the nonmember employee's salary, or payment is made a condition of employment for which a noncomplying employee may be terminated—NPCTA could enforce this contractual obligation only by suing to recover the amount of any unpaid fees.[2] Accordingly, when petitioners refused to pay their representation fees, NPCTA filed individual lawsuits against them in the Small Claims Division of the La Porte County Court. After the suits were consolidated, and after initial appellate proceedings established the legality of the representation fee provision in the collective bargaining agreement,[3] the consolidated case was remanded to the trial court for a determination of the proper amount of the representation fee for the 1980-81 school year.

Trial was held on May 7, 1984. The only evidence received by the court was testimony and documents introduced by NPCTA; petitioners presented no witnesses and introduced no documents. Three witnesses testified on behalf of NPCTA. These witnesses described in detail, with appropriate documentation, the activities engaged in by NPCTA, ISTA, and NEA during the 1980-81 school year; the amounts expended for each of these activities; and the specific relationship between these expenditures and the duties performed by NPCTA as the exclusive representative.[4] In addition to presenting evidence regard-

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[2] The Indiana courts have held that it would violate state law to make payment of a representation fee a condition of employment enforceable by termination. *See Anderson Federation of Teachers, Local 519 v. Alexander*, 416 N.E.2d 1327 (Ind. App. 1981).

[3] *See Stewart I*, note 1 *supra*. In their Petition for a Writ of Certiorari, petitioners do not—and could not—challenge the basic constitutionality of collecting representation fees from nonmember employees. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[4] These duties included, *inter alia*, bargaining with the School Corporation over "salary, wages, hours, and salary and wage related fringe benefits," Ind. Code § 20-7.5-1-4; engaging in discussions

ing the expenditures made by NPCTA, ISTA, and NEA for activities that were *included* in computing the representation fee that was sought from petitioners, NPCTA also presented evidence regarding those expenditures that it had excluded from the representation fee because it did not consider them to be sufficiently related to collective bargaining.

After reviewing the evidence presented by NPCTA, and the briefs that were filed by both parties, the trial court issued its opinion on June 22, 1984. The court began by declaring that:

> The scope of the fair-share representation fee is not limited solely to contract negotiation, but encompasses numerous statutory duties with their attendant responsibilities and activities. NPCTA's affiliation with NEA and ISTA provides necessary and vital resources. Without its affiliation with these associations, NPCTA could not meet its legal obligations. App. 14a.

The court then held that each petitioner was liable to NPCTA for a representation fee of $190.16 for the 1980-81 school year. Specifically, the court found:

> By a preponderance of the evidence, the plaintiff has established the amount of the fair-share fee for the school year 1980-81 assessable against each defendant to be in the sum of One Hundred Ninety Dollars and Sixteen Cents ($190.16). App. 16a.

This representation fee of $190.16 was comprised of $20.00 for NPCTA, $128.45 for ISTA, and $41.71 for NEA. App. 15a.

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with the School Corporation concerning "working conditions, other than [salary, wages, hours, and fringe benefits]; curriculum development and revision; textbook selection; teaching methods; selection, assignment, or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations," *id.* § 20-7.5-1-5; and processing grievances against the School Corporation pursuant to the negotiated grievance arbitration provision, *id.* § 20-7.5-1-4.

Petitioners appealed to the Court of Appeals of Indiana, raising several issues that were consolidated by that court into two questions: (1) whether the trial court erred in calculating the representation fee; and (2) whether the trial court erred in finding that the representation fee should include payments to ISTA and NEA. *See* App. 2a.

On the first issue, the Court of Appeals set forth the applicable standard for determining whether expenses are chargeable to employees who refuse to join the exclusive representative by quoting at length from this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984):

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. App. 6a (quoting *Ellis*, *supra*, 466 U.S. at 448).

The court noted that the collective bargaining agreement was fully consistent with this standard because it expressly "acknowledge[d] that objecting teachers should not be forced to pay for political or ideological activities 'unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to [NPCTA's] duties as exclusive bargaining representative.'" App. 6a. And, consistent with prior decisions of this Court and the Indiana courts, the Court of Appeals expressly stated that "NPCTA, ISTA, and NEA must prove the proportion of their total expenditures which were chargeable to objecting employees." App. 8a. *See Fort Wayne Educa-*

tion Association, Inc. v. Goetz, 443 N.E.2d 364, 373 (Ind. App. 1982), *transfer denied* ("the burden [is] upon the Association to show nonpolitical use of the funds").

Applying the foregoing standards to the record before it, the Court of Appeals concluded that NPCTA had met its burden of proof. Specifically rejecting petitioners' argument that "certain expenditures made by each organization" and included in the representation fee were not properly chargeable to objecting feepayers,[5] App. 8a, the appellate court held that there was sufficient "evidence of probative value to support the judgment" of the trial court, App. 9a.

With regard to the second issue raised on appeal—whether the representation fee should include payments to ISTA and NEA—the Court of Appeals also found sufficient evidence in the record to support the trial court's judgment. After first observing "that NPCTA had been elected exclusive representative in its affiliated status" with ISTA and NEA, and that "the collective bargaining agreement [itself] provides . . . that the representation fee shall include payments to ISTA and NEA," App. 4a-5a, the court rejected petitioners' contention that ISTA and NEA "allegedly provided no collective bargaining services to the teachers during the term for which payment is being sought," App. 4a. To the contrary, and on the basis of the evidence presented at trial, the court found that ISTA and NEA provided employees in the bargaining unit with numerous services that properly could be charged to objecting feepayers. As the court put it:

> [O]ne purpose of these payments [to ISTA and NEA] was to secure the availability of services from

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[5] These expenditures included the costs of lobbying governmental agencies on matters germane to NPCTA's duties as exclusive representative, App. 9a-10a; the costs of obtaining expert assistance from ISTA and NEA, App. 10a-11a; and the costs of attending ISTA meetings, App. 11a.

these organizations. As the United States Supreme Court has recognized,

> "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. *See* [*Machinists v.*] *Street*, 367 U.S. [740, 760 (1961)]. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required."

Abood v. Detroit Bd. of Education (1977), 431 U.S. 209, 221. Were NPCTA to hire local lawyers, negotiators or researchers, there would be little dispute that they could charge a fair share of the cost to the non-member teachers. Instead, they have chosen to pay a fixed, yearly amount for the continued availability of such services. The teachers cannot force NPCTA to abandon this approach, nor should they be allowed to benefit from the services of ISTA or NEA without paying a fair share of the cost of their continued availability. App. 5a.

The Court of Appeals then turned to the evidence presented in the trial court to identify certain of the specific collective bargaining services that were provided by ISTA and NEA. Dealing first with petitioners' challenge to "the expenditures of ISTA and NEA for lobbying governmental agencies other than the school board," App. 9a, the court stated that it "agree[d] with [the United States Courts of Appeals for both the Third and Ninth Circuits] that lobbying efforts germane to the union's duties as an exclusive representative are chargeable to objecting employees." App. 10a (citing *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), and *Champion v. State of California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985)). In addition to these lobbying expenses, the court found that:

> There was evidence at trial that ISTA and NEA, through Unified Services (UniServ), provided other more direct assistance to NPCTA in performing its duties as the teachers' exclusive representative. They provided training and assistance in the area of collective bargaining, as well as other areas. Under [Ind. Code §] 20-7.5-1-5, NPCTA is required to discuss with the school board such topics as curriculum development and textbook selection, and UniServ provided its expertise in these areas. App. 10a-11a.

The Court of Appeals concluded that:

> There was sufficient evidence that the payments to ISTA and NEA were "necessarily or reasonably incurred for the purpose of performing [NPTCA's] duties [as] an exclusive representative." *Ellis, supra,* [466 U.S. at 448]. The trial court did not err in ordering the teachers to reimburse ISTA and NEA. App. 11a.

Petitioners' motion for rehearing was denied, and the Supreme Court of Indiana refused to review the decision of the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioners challenge the ruling of the Court of Appeals of Indiana on two grounds: they claim initially that the method used by the court to calculate the amount of the representation fee was incorrect; and they claim, in addition, that the court erred when it included in the representation fee amounts to be paid to ISTA and NEA. As we shall demonstrate, petitioners' first claim is based upon a mischaracterization of the decision of the Court of Appeals, and their second claim relates to conclusions reached by that court with regard to the sufficiency of the evidence presented in the trial court. Neither of these claims presents a question that warrants further review by this Court.

I. THE CONCLUSION OF THE COURT OF APPEALS OF INDIANA THAT NPCTA HAD PRESENTED SUFFICIENT EVIDENCE OF ITS CHARGEABLE EXPENDITURES TO JUSTIFY THE REPRESENTATION FEE AWARDED BY THE TRIAL COURT DOES NOT WARRANT REVIEW BY THIS COURT

The first of the two Questions Presented in the Petition for Certiorari is as follows:

> WHEN A UNION SUES A DISSENTING NONMEMBER TO COLLECT AN UNPAID REPRESENTATION FEE, IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:
>
> A. A Pro Rata Share Of The Proven Costs Of Collective Bargaining; Or
>
> B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

The clear implication to be drawn from this question is that the Court of Appeals based its affirmance of the trial court's award of a $190.16 representation fee on a "dues-less-rebate" approach. This is not in fact so. Consistent with the decisions of this Court and the courts of Indiana, the Court of Appeals required "NPCTA, ISTA, and NEA [to] prove the proportion of their total expenditures which were chargeable to objecting employees." App. 8a.

This Court's decisions establish that it is constitutional to require bargaining unit employees, over their objection, to support union activities that are related to collective bargaining. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. ——, 106 S. Ct. 1066, 1069 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 217-32 (1977). It is equally well-established that, once a representation fee is challenged by a nonmember employee, the union has the burden of proving the appropriate fee amount:

" 'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.' " *Abood, supra*, 431 U.S. at 239-40 n.40 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)), *quoted in Hudson, supra*, 106 S. Ct. at 1075.

Last Term, in *Hudson, supra*, this Court provided further guidance with regard to the nature of this burden. The Court in *Hudson* stated that a union could not simply "identif[y] the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers," and then charge nonmembers a fee based upon the remaining percentage of total expenditures. 106 S. Ct. at 1076. Rather, a union that seeks to collect representation fees from nonmembers has the burden of "identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.*[6]

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[6] For purposes of argument, we assume in this brief that this requirement applies to the collection of representation fees by exclusive representatives in Indiana, and demonstrate that NPCTA in fact complied with this requirement. It is important to note, however, that the Court in *Hudson* was dealing with the totally different situation in which a union seeks to collect and expend representation fees *before* an impartial determination has been made as to the allowable amount of the fee. In such circumstances, the Court indicated that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to guage the propriety of the union's fee." 106 S. Ct. at 1076. This rationale is not applicable in Indiana: there is no risk to a nonmember employee's First Amendment rights, inasmuch as state law prohibits the involuntary collection of representation fees from public school teachers, by payroll deduction or otherwise, unless and

Despite petitioners' protestations to the contrary, *see* Petition at 13-14, this is precisely the burden of proof that NPCTA was required to, and did in fact, meet in this case. As described more fully in the Statement of the Case, *supra* at 5-6, the Court of Appeals expressly stated that NPCTA and its affiliated organizations "must prove the proportion of their total expenditures which were chargeable to objecting employees," App. 8a, and it was based on this standard that the court concluded that there was sufficient evidence in the record to support the trial court's judgment that NPCTA was entitled to a representation fee of $190.16. Moreover, this was not a new approach for the Indiana courts, for in the leading case upholding the imposition of representation fees under Indiana law, the Court of Appeals previously had concluded that "the burden [is] upon the Association to show nonpolitical use of the funds." *Goetz*, *supra*, 443 N.E.2d at 373. In short, the holding of the Court of Appeals is fully consistent with this Court's agency fee decisions, including its decision in *Hudson*.

To be sure, in the course of its decision the Court of Appeals noted that the amount of the representation fee awarded by the trial court was less than the amount of dues charged to members of NPCTA, and that this reduction "reflect[ed] the proportion of each organization's budget which was allocated for non-chargeable political or ideological activities, according to internal estimates." App. 7a. With this language, however, the court plainly did not mean to suggest that NPCTA had failed to meet its burden of proving chargeable expenditures, for that would have been flatly inconsistent both with its own statement three paragraphs later, App. 8a ("NPCTA, ISTA, and NEA must prove the proportion of their total expenditures which were chargeable to objecting employees"), and with established Indiana law on the subject,

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until there has been a final court judgment against the teachers awarding a specified representation fee to their exclusive representative.

see Goetz, supra, 443 N.E.2d at 373. Rather, this statement merely reflected the fact that, during the trial, NPCTA did more than was required: it not only proved chargeable expenditures, but also identified those expenditures which could not be included in the representation fee.[7]

Petitioners' assertion that the Court of Appeals based the representation fee on "Union Dues Less A Union-Determined Rebate Amount," Petition at i, rather than on proof of NPCTA's chargeable expenditures, reflects a total misunderstanding of the role that membership dues played in the court's calculation of the fee. The dues were not used by the court to alter in any way the requirement that "NPCTA, ISTA, and NEA must prove the proportion of their total expenditures which were chargeable to objecting employees." App. 8a. It was only *after* that requirement had been satisfied that dues were used as a benchmark against which to calculate the allowable representation fee. Simply stated, once sufficient evidence had been introduced to establish the percentage of the total expenditures of NPCTA, ISTA, and NEA that "were 'necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative,' " App. 11a (quoting *Ellis, supra*, 466 U.S. at 448), the court applied that percentage to the dues charged to NPCTA members to determine the amount of the representation fee.

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[7] There is one other paragraph in the Court of Appeals' opinion that, on its face, may appear inconsistent with this Court's decision in *Hudson*. *See* App. 7a. Because there was sufficient evidence in the record with regard to NPCTA's chargeable expenditures to support the trial court's judgment, however, this paragraph was completely unnecessary to the Court of Appeals' holding and therefore cannot provide the basis for review by this Court. *See Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (this Court "reviews judgments, not statements in opinions"); *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) (same).

This use of dues as the final step in the representation fee calculation process finds ample support in the decisions of this Court, *see, e.g., Abood, supra*, 431 U.S. at 238 (citing *Machinists v. Street*, 367 U.S. 740, 774-75 (1961), for remedy of "restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes"), and is in accord with the approach taken in various statutes authorizing the collection of representation fees, *see, e.g.*, 45 U.S.C. § 152, Eleventh (Railway Labor Act provision linking involuntary membership fees to dues); Mich. Comp. Laws § 423.210(1)(c) (providing that representation fees for Michigan public employees may be "equivalent to the amount of dues uniformly required of members"); N.J.S.A. 34:13A-5.5(b) (providing that representation fees for New Jersey public employees may not "exceed 85% of the regular membership dues").

Petitioners contend that *Hudson* supports their position, but they are mistaken. There is nothing in that decision that disallows a cross-reference to dues for purposes of calculation *after* a union has, as NPCTA did here, proven the percentage of its total expenditures that is chargeable to nonmembers. Although a union's total expenditures may not in each and every year be precisely the same as its total dues income, the Court in *Hudson* obviously intended to allow for this type of minimal discrepancy when it reaffirmed that " '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.' " 106 S. Ct. at 1076 n.18 (quoting *Allen, supra*, 373 U.S. at 122, and *Abood, supra*, 431 U.S. at 239-40 n.40). Indeed, both the Court of Appeals and the Supreme Court of Indiana specifically considered the propriety of NPCTA's representation fee in light of *Hudson*. Thus, petitioners emphasized the alleged conflict between the decision in this case and the March 4, 1986 decision in *Hudson* when filing their motion for rehearing in the Court of Appeals and their petition to

transfer the case to the Supreme Court of Indiana. Those courts summarily denied petitioners' requests on March 26, 1986 and July 7, 1986, respectively. *See* App. 17a, 18a.[8]

In short, the first Question Presented in the Petition for Certiorari is based on a mischaracterization of the decision of the Court of Appeals of Indiana, and therefore cannot properly provide the basis for review by this Court.

II. THE CONCLUSION OF THE COURT OF APPEALS OF INDIANA THAT THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO INCLUDE PAYMENTS TO ISTA AND NEA IN THE REPRESENTATION FEE DOES NOT WARRANT REVIEW BY THIS COURT

Petitioners do not contend that "amounts spent by ISTA and NEA in support of collective bargaining activities by NPCTA are not chargeable to nonmembers."

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[8] Petitioners also seek to demonstrate that the representation fee was excessive by comparing total expenditures by NPCTA, ISTA, and NEA for the 1980-81 school year to the number of "employees in [NPCTA's bargaining] unit" and "potential ISTA [and NEA] members" during that year. *See* Petition at 4-5. Even assuming, *arguendo*, that petitioners correctly state the number of employees represented and dollars expended, these numbers are explained by the annual fluctuations that are inherent in any union's budgetary process. Despite these fluctuations, unions almost invariably choose to assess a flat rate of dues on their members, rather than constantly changing their dues structure to account for annual variations in expenditures. The same administrative latitude surely must be available for representation fees. *Cf. Hudson, supra*, 106 S. Ct. at 1076 n.18 ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year"). Indeed, NPCTA's expenditures for 1980-81 were somewhat lower than in other years because it was in the middle of a three-year collective bargaining agreement with the School Corporation. The record shows that in subsequent years, when NPCTA returned to the bargaining table, total expenditures actually exceeded total revenue from dues, and the carryover from the 1980-81 school year was used to cover the shortfall.

Petition at 20. To the contrary, petitioners concede that, "if proved, they could be charged a pro rata share of such costs." *Id.* *See Hudson, supra,* 106 S. Ct. at 1076 n.18 (indicating that, upon proper showing, a union's payments "to its affiliated state and national labor organizations" may be included in a representation fee). What petitioners do contend is that the Court of Appeals erred when it included payments to ISTA and NEA in the representation fee "because NPCTA presented no evidence of actual expenditures by its affiliates for the petitioners' bargaining unit, [and] NPCTA failed to carry its burden of proof." Petition at 20.

Although this contention simply disregards the record in this case,[9] we oppose petitioners' request for review on a more basic ground. Their argument relates solely to conclusions reached by the Court of Appeals with regard to the sufficiency of the evidence presented in the trial court. When all is said and done, petitioners simply disagree with the holding of the Court of Appeals that:

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[9] As explained more fully in the Statement of the Case, *supra* at 6-8, the Court of Appeals found ample evidence in the record to demonstrate that ISTA and NEA provided "direct assistance to NPCTA in performing its duties as the teachers' exclusive representative," including training and assistance in the area of collective bargaining, App. 10a-11a, expert assistance on topics such as curriculum development and textbook selection, App. 11a, meetings providing information and training in collective bargaining techniques and other operational needs, App. 11a, and access to lawyers, economists, negotiators, researchers, and other expert personnel to assist NPCTA in its role as exclusive representative, App. 5a. As succinctly stated by the Court of Appeals:

> Were NPCTA to hire [these experts], there would be little dispute that they could charge a fair share of the cost to the nonmember teachers. Instead, they have chosen to pay a fixed, yearly amount for the continued availability of such services. [Petitioners] cannot force NPCTA to abandon this approach, nor should they be allowed to benefit from the services of ISTA and NEA without paying a fair share of the cost of their continued availability. App. 5a (citing *Abood, supra,* 431 U.S. at 221).

> There was sufficient evidence that the payments to ISTA and NEA were "necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative." App. 11a (quoting *Ellis, supra*, 461 U.S. at 448).

This disagreement clearly does not present a question that warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. THE OPPOSITION MISREPRESENTS THE ISSUES RAISED BY THE PETITION AND BY THE RECORD.

Initially, the respondent argues that the first question presented by the petitioners is based on a mischaracterization of the decision of the Indiana Court of Appeals and therefore it cannot provide the basis for review by this Court. However, it is the respondent that has mischaracterized the decision below.

Based upon the respondent's presentation the Indiana Court of Appeals affirmed a determination that the petitioners had to pay a fee equal to union dues less the respondent's self-determined rebate. Specifically, the court said:

> The trial court did not err in basing the representation fee on regular dues less an amount spent on political or ideological activities unrelated to NPCTA's duties as an exclusive representative.

App. 8a. The first question presented asks whether the First Amendment permits this method of calculation or whether an agency fee must be based on a pro rata share of the proven costs of collective bargaining.

The record below clearly shows that a pro rata share is much less than the dues-less-rebate figure approved by the Indiana Court of Appeals. Thus, the First Amendment violation which is caused by the decision below is apparent.

The simple question—how do you calculate an agency fee—is fundamental, and the answer affects every agency fee payer in the country in both the public and the private sectors. The court below misinterpreted this Court's agency fee decisions in *Chicago Teachers Union v. Hudson*, 475 U.S. _____, 106 S.Ct. 1066 (1986), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961), and reached the wrong answer. The need for further guidance from this Court in this sensitive area impacting on First Amendment interests is clear. The petition should be granted in order to provide the lower courts with guidance that is obviously necessary.

II. THIS COURT IS NOT BEING ASKED TO REVIEW THE FACTUAL DETERMINATIONS OF THE COURT BELOW.

Respondent argues that the second question really

involves a mere disagreement with the factual conclusions reached by the court below and that in raising it the petitioners disregard the record in the case. Apparently, the respondent does not perceive the issue.

Petitioners contend that before fees for affiliated organizations may be awarded, it must be shown that the expenses were incurred on behalf of petitioners' bargaining unit. The record below is clear that no proof was offered as to how much money either ISTA or NEA spent in providing services to the exclusive representative in this case. Petitioners argue, then, as a matter of law, that that failure is fatal to the claim for fees for the affiliated organizations. This Court has indicated that such proof is required. *Ellis*, 466 U.S. at 448, 453; *and see* petition at pp. 14-21. The absence of proof of the costs entailed in providing collective bargaining services to the unit to which the petitioners belong is fatal to the claim for fees for ISTA and NEA.

CONCLUSION

For the foregoing reasons and for the reasons stated in

the petition the Court should grant the petition and set the case down for plenary briefing and argument.

Respectfully submitted,

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